Supreme Court, U.S.
FILED

No. 04-

04 899 DEC 30 2004

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IN THE

Supreme Court of the United States

ATTICA CENTRAL SCHOOLS,

Petitioner,

v.

J.S. [HEREINAFTER "JOHN"], BY HIS PARENT AND NATURAL GUARDIAN, N.S.; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; S.H. AND C.H. [HEREINAFTER "SALLY" AND "CHARLES"], BY THEIR PARENT AND NATURAL GUARDIAN, J.H., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; C.Z. AND K.Z. [HEREINAFTER "CAROLINE" AND "KEN"], BY THEIR PARENT AND NATURAL GUARDIAN, K.Z., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; D.E., [HEREINAFTER "DENNIS"] BY HIS PARENT AND NATURAL GUARDIAN, S.E., ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court recognize an exception to the requirement for the exhaustion of administrative remedies contained in 20 U.S.C. §§ 1415(i) and (l) where (1) plaintiffs allege that a local school district has committed systemic violations of the IDEA (Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*) and of other laws that provide relief which is available under the IDEA, and (2) plaintiffs bring no claims against the State?

2. Does the failure to exhaust administrative remedies in such a case require dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1)?

3. Is a claim raised under 29 U.S.C. § 794(a) ("Section 504") complaining of accessibility issues concerning a school building and its programs subject to the exhaustion requirement of 20 U.S.C. § 1415(l)?

4. Is such a claim subject to the requirement that Section 504 claims involving special education must include allegations of bad faith and/or gross misjudgment?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceedings below are listed in the caption. Although the plaintiffs purport to file actions on behalf of the individuals and also "on behalf of all others similarly situated," the action has not been certified as a class action. Plaintiffs have, however, indicated their intention to renew their motion to certify a class.

Petitioner Attica Central Schools is a governmental entity not subject to Rule 29.6.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of All Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Basis for Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case Setting Out the Material Facts	3
Reasons for Granting the Petition	6
I. Review Is Warranted To Resolve The Conflict Concerning The Scope Of The Judicially Created Exception To The Requirement For The Exhaustion Of Administrative Remedies In Cases Alleging "Systemic" Violations.	12

Contents

Page

A. The Conflict Among the Circuit Courts of Appeals Concerning the Requirement for the Exhaustion of Administrative Remedies and the Jurisdictional Prerequisites for Bringing an Action Alleging "Systemic" Violations *By a School District* Should Be Resolved. . . 12

B. The Resolution of These Conflicts Goes Far Beyond The Individual Parties. . . . 15

II. Review Is Necessary To Settle An Important Federal Question Concerning Implementation Of The IDEA. The Implementation Of A Massive Federal Education Scheme Should Be Uniform Throughout The Country. This Is Especially So Concerning Procedural Rules Governing The Steps In Dispute Resolution. Only By This Court Granting Certiorari Can This Issue Be Addressed And Resolved. . . . 16

III. Review Is Required In Order To Define The Parameters For The Utilization Of Judicial Resources. 17

IV. Review Is Required In Order To Settle The Question Of Whether Or Not A Section 504 "Accessibility" Claim Concerning Special Education Is Subject To The Exhaustion Requirement. 18

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Association for Community Living in Colorado v. Romer, 992 F.2d 1040 (10th Cir. 1993) 11

Beth V. v. Carroll, 87 F.3d 80 (3dCir. 1996) 10-11

Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) ... 6, 15, 16

Burlington School Committee v. Department of Education, 471 U.S. 358 (1985) 6, 15, 16

Cedar Rapids Community School District v. Garrett F., 526 U.S. 66 (1999) 7

Florence County School District Four v. Carter, 510 U.S. 7 (1993) 6

Hoeft v. Tucson Unified School District, 967 F.2d 1298 (9th Cir. 1992) 9, 10

Honig v. Doe, 484 U.S. 305 (1988) 12

Hope v. Cortines, 69 F.3d 687 (2d Cir. 1995), *aff'g* 872 F. Supp. 14 (E.D.N.Y. 1995) 10

Irving Independent School District v. Tatro, 468 U.S. 883 (1984) 7

Cited Authorities

	Page
J.S. v. Attica Central Schools, 386 F.3d 107 (2d Cir. 2004)	1
McCarthy v. Madigan, 503 U.S. 140 (1992)	10
McKart v. United States, 395 U.S. 185 (1969)	10
United States Constitution:	
Fourteenth Amendment	4
Statutes:	
20 U.S.C. § 1415	7
20 U.S.C. § 1415(f)	8
20 U.S.C. § 1415(i)(1)	i, 1, 3, 7
20 U.S.C. § 1415(i)(2)(A)	1
20 U.S.C. § 1415(l)	i, 2, 18
20 U.S.C. § 1400, *et seq.*	i
28 U.S.C. § 1254(l)	1
28 U.S.C. § 1292(b)	5, 17
28 U.S.C. § 1331	3

Cited Authorities

	Page
28 U.S.C. § 1343(a)(3)	3
28 U.S.C. § 1343(a)(4)	3
28 U.S.C. § 2201	3
28 U.S.C. § 2202	3
29 U.S.C. § 794	i, 3, 4, 18, 19
42 U.S.C. § 1983	3, 4, 5
Rules:	
F.R.C.P. Rule 8(a)(1)	3
F.R.C.P. Rule 12(b)(1)	i, 5
Other Authorities:	
N.Y. Educ. Law 4404(2)	8, 9
8 N.Y.C.R.R. 200.2(e)	9
8 N.Y.C.R.R. 200.5(i)	9

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated, Decided, And Entered October 6, 2004 ..... 1a

Appendix B— Order Of United States Court Of Appeals For The Second Circuit, Granting Motion For Leave To Appeal Filed And Entered February 26, 2003 ..... 18a

Appendix C — Order Of The Honorable William M. Skretny Withdrawing The Motion To Certify The Class Dated February 11, 2003 (Entered On The Western District Docket On February 11, 2003) 20a

Appendix D — Decision And Order Of The Honorable William M. Skretny, Dated September 3, 2002, Granting Certification For Interluctory Appeal Under 20 U.S.C. § 1292(b) (Entered By The Western District On September 9, 2002) ... 23a

Appendix E — Decision And Order Of The Honorable William M. Skretny Dated September 30, 2001, Denying The Defendant's Motion To Dismiss (Entered On The Western District Docket On October 1, 2001) 30a

Appendix F — Relevant Statutes 45a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit for which a Writ of Certiorari is being sought is dated October 6, 2004 and is reported at *J. S. v. Attica Central Schools*, 386 F.3d 107, 2004 WL 2244235 (2d Cir. 2004). None of the other opinions or orders in this case have been reported. The opinion affirmed the decision of the United States District Court for the Western District of New York dated September 30, 2001 and entered October 1, 2001. The Western District had certified its decision for interlocutory appeal and the Second Circuit granted permission to appeal. The Motion of Plaintiffs to certify a class was ordered withdrawn without prejudice by the Western District on February 11, 2003. *See* Appendices A through E for various decisions and orders below.

BASIS FOR JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on October 6, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statutes involved in this matter are the following:

Title 20 United States Code, Section 1415(i)(1)-(2)(A)

20 U.S.C. § 1415(i)(1)-(2)(A) provides as follows:

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section

shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Title 20 United States Code, Section 1415(l)

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies

> available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under Subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

These statutes are also set forth in Appendix F. Additional statutes are set forth in Appendix F at 49a-50a.

STATEMENT OF THE CASE SETTING OUT THE MATERIAL FACTS

1. The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of New York, rests on 20 U.S.C. § 1415(i) [apparently erroneously listed as § 1415(e) in Respondents' Complaint] and § 1415(l). Respondents also referred to 29 U.S.C. § 794 ("Section 504"), 28 U.S.C. § 1343(3) and (4) (probably should be § 1343(a)(3) and (4)), 42 U.S.C. § 1983, 20 U.S.C. § 1400, *et seq.*, 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202. Respondents have admitted that they did not exhaust administrative remedies as statutorily required but have asserted in response to Petitioner Attica Central Schools' Motion to Dismiss that they should be exempted from the requirement.[1]

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1. Respondents did not even allege in their complaint that they were somehow exempted from the exhaustion requirement and, thus, the complaint failed to comply with Federal Rule of Civil Procedure 8(a)(1), 28 U.S.C. Rule 8.

2. On April 11, 2000, Respondent J.S. requested an administrative due process hearing under the IDEA concerning certain actions of Attica Central Schools. The matters raised were settled and memorialized in a Settlement Agreement dated May 1, 2000. Affidavit of Elizabeth R. Wright dated October 12, 2000 (submitted to the Western District).

3. On April 3, 2000, Respondent D.E. requested an administrative due process hearing concerning certain actions of Attica Central Schools. The matters raised were settled and memorialized in a Settlement Agreement dated April 17, 2000. Exhibit B to Affidavit of Jay C. Pletcher dated October 12, 2000 (submitted to the Western District).

4. On June 14, 2000 (stamped, however, June 13, 2000), those two Respondents, together with the other Respondents, filed an action in the United States District Court for the Western District of New York complaining of various actions by Attica Central Schools and alleging that Attica was in violation of the IDEA, Section 504 of the federal Rehabilitation Act (29 U.S.C. § 794), 42 U.S.C. 1983 (U.S. Constitution Amendment 14), and various state statutes and a state constitutional provision.

5. Respondents denominated their Complaint as being accompanied by a motion for class certification. That motion has never been addressed by any court and Respondents have withdrawn their motion without prejudice.

6. Neither in their requests for due process hearings nor in the settlement negotiations concerning those requests did J.S. or D.E. raise any of the issues raised in the complaint which they filed in federal District Court. In fact, they have admitted that they *purposely* did not raise the issues. They

contend that it was not appropriate to do so because *they believed* that the issues were not of a type that would be considered in administrative proceedings. Complaint ¶67.

7. None of the other Respondents have sought due process hearings concerning the issues raised in the complaint which they filed with the Western District of New York.

8. Petitioner, Attica Central Schools, filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b) with the Western District of New York on August 15, 2000 seeking dismissal on the ground of lack of subject matter jurisdiction for failure to exhaust administrative remedies. In the Motion, Petitioner also sought dismissal of certain counts on the ground that Respondents failed to plead a violation of the applicable standards of conduct required under Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983.

9. On September 30, 2001, the Western District of New York denied Attica's Motion.

10. Subsequently, Attica moved the Western District to certify its Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and the court did so by Decision and Order dated September 3, 2002 and entered September 9, 2002. Appendix D. The Second Circuit granted permission to appeal pursuant to 28 U.S.C. § 1292(b) by its Order dated February 26, 2003. Appendix B.

11. The Second Circuit entered its decision on October 6, 2004, affirming the lower court's denial of Petitioner's Motion to Dismiss. Petitioner timely filed a Motion to Stay the Mandate of the Second Circuit on October 26, 2004. The Second Circuit denied the Motion to Stay on November 10, 2004. Petitioner filed an Application For Stay with Justice Ginsburg which was denied on December 15, 2004.

REASONS FOR GRANTING THE PETITION

This case depends upon resolution of Respondents' assertion that they can ignore the requirement for the exhaustion of administrative remedies simply because they allege "systemic" violations of various laws. Whether or not individuals can refuse to utilize the statutorily mandated administrative remedies provided under the IDEA before filing a special education complaint in federal court alleging "systemic" violations by a local school district is an important question of federal law that should be settled by this Court. This is especially so in light of the decisions of various United States Courts of Appeals which conflict or, at best, present ambiguous positions. Simply put, the issue of whether or not individuals can unilaterally choose to dispense with jurisdictional prerequisites is appropriate for resolution by this Court.

This Court has previously defined the obligation to provide FAPE (Free Appropriate Public Education) under the IDEA,[2] has clarified the rights of parents to seek reimbursement when they believe that a school district has failed to meet that standard,[3] has clarified that appropriate unilateral placements may be made in certain circumstances in "non-approved" schools,[4] and has explained what sorts of

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2. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

3. *Burlington School Committee v. Department of Education*, 471 U.S. 358 (1985).

4. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

medical services do and do not fall within the obligations of local school districts under IDEA.[5]

This Court has not, however, ever addressed the jurisdictional prerequisites for seeking judicial intervention in special education disputes. As a result, there is considerable confusion and conflict among the decisions of the Circuit Courts of Appeals. Access to judicial process has been provided across the United States unevenly at best and according to contradictory and ambiguous criteria.

Section 1415 of United States Code explicitly requires the exhaustion of administrative remedies in IDEA actions and actions under other statutes encompassing complaints subject to IDEA-type relief. 20 U.S.C. §§ 1415(i) and (l). Some judicial exceptions to the IDEA exhaustion requirement have been recognized, but these have been quite limited. Respondents seek to establish a broad dismantling of the jurisdictional prerequisite by simply ignoring it and filing a complaint in federal court alleging "systemic" violations by a local school district.[6]

Because nothing in the statute provides for such an exception, the United States Circuit Courts of Appeals have struggled with defining a possible exception where systemic problems are alleged in a complaint. Some Circuit Courts

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5. *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999); *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

6. Respondents did not even allege compliance with, or exemption from, the jurisdictional prerequisite. See footnote 1 above. Respondents also intend to subsequently renew their efforts to seek certification of the action as a class action.

have ruled that allegations of "systemic" violations by a school district involve considerations different from those involving allegations against a state and that exhaustion is required if the allegations are against a local school district but excused when allegations are made against a state. Other Circuit Courts have simply ruled that allegations of systemic violations excuse exhaustion making no distinction between cases in which a state is the defendant and those in which a school district is the defendant.

It is well established that there can be judicial exceptions to the exhaustion requirement. It is also clear that one such exception may lie where a complaint is brought alleging "systemic" violations *by a state*. This is premised on the notion that it would be futile to ask a *state*, which is legally responsible for implementation of IDEA and special education within its borders, to administratively review its very own laws and procedures. The conflict in the decisions of the Circuit Courts of Appeals does not involve that exception to the exhaustion requirement but involves a very different situation. The conflict is over whether or not exhaustion is excused in cases of allegations of systemic violations by a *school district*.

When allegations are made against a *local school district*, even when the allegations are of "systemic" violations, the school district does not review its own rules, procedures, and implementation. Rather, under IDEA the state must provide an administrative review.[7] The distinction between

7. The administrative review procedures are state procedures. 20 U.S.C. § 1415(f); New York Education Law § 4404. Two levels of administrative proceedings are provided under New York law. In some states, all logistics concerning the first level of the state

(Cont'd)

complaints against a school district and those against a state are not academic. If plaintiffs can force a school district into federal court by merely alleging "systemic" violations, they can require the school district and the courts to face massive and burdensome litigation which could instead be addressed through the statutorily mandated state administrative procedures.

The Ninth Circuit has ruled that complaints of "systemic" violations by a school district are very different from complaints of "systemic" violations by a state. In *Hoeft v. Tucson Unified School District*, 967 F.2d 1298 (9th Cir. 1992), the court held that exhaustion is not excused for complaints of "systemic" violations by school districts as opposed to allegations of "systemic" violations by states. The Second Circuit adopted the same rule, relying on *Hoeft*.

(Cont'd)

administrative review proceedings are handled by the State Education Department or similar state agency. In other states, such as New York, a nondiscretionary "appointment" is made by the school district, but the state sets the regulations and rules for the hearings, trains and certifies the hearing officers, and specifies all the procedures to be followed by the hearing officer as well as requiring the hearing officer to file any decision with the state. The hearing officers act for the state and the state hears any complaints made about their performance. The only action taken by the local school district is the ministerial logistic of communicating to the individual on the state list of hearing officers that he or she has been appointed from a list of state certified hearing officers as the hearing officer for a particular case. This is simply a distribution of logistical duties and in no way alters the fact that the administrative review is pursuant to state rules and procedures by individuals who are legally forbidden to be employees of the school district. 8 N.Y.C.R.R. §§ 200.2(e) and 200.5(i). The second level of state review is conducted by the State Review Officer. Education Law § 4404[2].

Hope v. Cortines, 69 F.3d 687 (2d Cir. 1995), *aff'g*, 872 F. Supp. 14, 23 (E.D.N.Y. 1995). Both courts were explicit:

> Plaintiffs' challenge is to local school district policies, not state policies. . . . The IDEA's administrative review scheme thus represents an important resource to aid states in fulfilling their oversight responsibilities. Circumventing this scheme where local policies are challenged undermines the IDEA's enforcement structure.

Hoeft, 967 F.2d at 1307.

> Because plaintiffs allege that defendants, and not the state, adopted the discrimination policies of which they complain, the Court holds that the purpose of the exhaustion doctrine would be undercut by allowing plaintiffs to seek redress in this tribunal rather than affording the state (and defendants) the opportunity to rectify any errors.

Hope, 872 F. Supp. at 23, *aff'd*, 69 F.3d 687, 688.

Hoeft and *Hope* are based on the principles announced by this Court in *McCarthy v. Madigan*, 503 U.S. 140 (1992) and *McKart v. United States*, 395 U.S. 185 (1969), which explained the rationale for exhaustion requirements.

On the other hand, other Circuit Courts, notably the Third and Tenth Circuits, have not recognized a difference between actions brought against states and those brought against local school districts and have ruled that exhaustion may be excused whenever a complaint contains allegations of systemic deficiencies. *Beth V. v. Carroll*, 87 F.3d 80, 89

(3d Cir. 1996) ("plaintiffs may thus be excused from the pursuit of administrative remedies where they allege systemic legal deficiencies"); *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) ("Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms").

The significance of the differences in these holdings requires a determination by this Court as to whether or not the mere use of the word "systemic" or the mere categorization of a complaint as including allegations of "systemic" deficiencies warrants an excuse from the exhaustion requirement and forcing local school districts to become defendants in federal litigation in which the plaintiffs will almost always seek certification of a class.

In sum, review by this Court is necessary to ensure the uniform application of federal law on the *jurisdictional* prerequisites to judicial intervention.[8] While this Court has broadly defined the parameters of the IDEA's substantive requirements concerning special education, this Court has never decided the important federal question of the jurisdictional prerequisites to bringing a judicial action

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8. The federal special education laws have been in effect for many years. IDEA and its predecessor versions date back to 1975, the Education for All Handicapped Children Act of 1975 (Public Law 94-142) (the "EHA"). Thirty years is too long a time for conflicts concerning the jurisdictional prerequisites for judicial intervention to continue to affect some 16,850 school districts and approximately 48 million students. National Center for Education Statistics, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the Untied States: 1999-2000*, Table A, http://nces.ed.gov/pubs2001/100_largest/discussion.asp.

seeking a remedy.[9] As a result, the conflict in the decisions of the Circuit Courts of Appeals has served to undermine the legal application of the substantive rules previously defined by this Court. Review of this case is essential to clarify the federal special education dispute resolution scheme and to provide uniform criteria for judicial intervention.

I. Review Is Warranted To Resolve The Conflict Concerning The Scope Of The Judicially Created Exception To The Requirement For The Exhaustion Of Administrative Remedies In Cases Alleging "Systemic" Violations.

A. The Conflict Among the Circuit Courts of Appeals Concerning the Requirement for the Exhaustion of Administrative Remedies and the Jurisdictional Prerequisites for Bringing an Action Alleging "Systemic" Violations *By a School District* Should Be Resolved.

Judicially created exceptions to statutorily imposed jurisdictional prerequisites are problematic. They invite conflicts among the Circuit Courts. Judicial exceptions are an important part of the jurisprudence of the courts, but any exceptions must be clearly defined in order to eliminate conflicts in the availability of access to the judicial system and in the necessity for defending oneself in federal litigation. The Third and Tenth Circuits have applied a broad brush exception for complaints containing allegations of "systemic"

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9. Nearly seventeen years ago, this Court declared that exhaustion could sometimes be excused in special education cases, but it has never defined the scope of possible exceptions. *Honig v. Doe*, 484 U.S. 305, 326-27 (1988).

violations. The Ninth and Second Circuits have announced a different rule: that while there may be an exception to the exhaustion requirement where allegations of "systemic" violations are made against a state, there is no such exception when allegations of "systemic" violations are lodged against a local school district. This conflict is not a matter of differences in the analysis of various specific factual circumstances but rather is a conflict at the very heart of the parameters for access to the judicial system and for when a school district may be forced to become a defendant in federal litigation.

The Second Circuit acknowledged the importance of resolving the conflict when it accepted the issue for interlocutory review in this case. The Second Circuit accepted for appeal the issue certified by the Western District: "whether or not the 'systemic violations' exception to the exhaustion requirement applies in an action *against a local school district*. . . ." (emphasis supplied). Appendix D at page 27a. The issue to be resolved is whether or not the systemic violations exception applies when the defendant is a local school district rather than a state. Unfortunately, the Circuit Court's decision failed to resolve the conflict concerning the question.

While courts may come to different conclusions on *factual* determinations concerning similar situations, it is incompatible with the basic tenets of the judicial process that the very opportunity to bring an action in court, and the *obligation to defend against litigation*, should vary dramatically under the same federal statute depending upon the geographical location of students and school districts because different legal criteria are applied.

This is particularly so since the IDEA and its predecessor (Public Law 94-142) date back to the 1970's and affect every public and private school student and every public school district in the United States on a daily basis. It is unfortunate that educational disputes sometimes require outside intervention for resolution, but disputes are a reality. IDEA rests on the premise that judicial intervention should be the last resort and not the first resort. The codification of an exhaustion requirement is a key part of this scheme and exceptions to exhaustion should not be governed by different legal rules. Whatever the rules may be for jurisdictional prerequisites for use of the courts, and particularly for judicial exceptions, they should be clear and consistent. It is contrary to the sound provision of education, a fair administration of federal programs, and due process in dispute resolution for conflicts about jurisdictional prerequisites to remain unresolved. This Court has established parameters governing the substantive rights and obligations under IDEA. The country would be well served if the Court established the jurisdictional prerequisites for judicial dispute resolution as well.[10]

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10. The IDEA has recently been reauthorized. P.L. 108-446. The new statute not only retains the exhaustion requirement but expands it by requiring that complaining parents make their complaints about school districts specific or risk having to amend their complaint to include the required specificity before proceeding and that ordinarily a settlement conference ("resolution session") must be held prior to the administrative proceedings. Sections 615(b)(7), 615(c), and 615(f).

B. The Resolution of These Conflicts Goes Far Beyond The Individual Parties.

The request for review by this Court involves far more than the individual interests of the parties. A determination of the jurisdictional prerequisites here will dramatically affect the actual communications, negotiations, and procedures for dispute resolution among the thousands of school districts in the United States and the millions of school-age students. Resolution of the conflict among the Circuits will be as important or more important than this Court's previous decisions in *Rowley* and *Burlington.* In those earlier cases, this Court set the ground rules concerning the substance of disputes and ultimate remedies. A determination by this Court of the issue posed here will set the boundaries for the utilization of procedures for resolving complaints. It will either greatly expand the initial utilization of judicial resources in these educational disputes or will uphold a statutory limit and require use of the statutorily provided dispute resolution procedures.

II. Review Is Necessary To Settle An Important Federal Question Concerning Implementation Of The IDEA. The Implementation Of A Massive Federal Education Scheme Should Be Uniform Throughout The Country. This Is Especially So Concerning Procedural Rules Governing The Steps In Dispute Resolution. Only By This Court Granting Certiorari Can This Issue Be Addressed And Resolved.

The IDEA embodies the federal scheme for funding and directing the provision of special education across the entire country. Clearly, the individual instruction received by millions of students across the country varies in detail depending upon a host of factors: student needs, the teachers and other personnel involved, the available information, available resources, and cooperation between families and schools. This Court has declined to become involved in the details of individual educational decisions. It has not, however, been hesitant to define the general parameters for the implementation of the IDEA.

There is little doubt that this Court would not have accepted the *Rowley* case for review if it had perceived its impact as affecting only the singular determination of the precise amount of communication support required to be provided to a young hearing impaired student. *Rowley* was accepted for review so that the parameters of the special education required under the IDEA (the EHA predecessor statute) would be defined.[11] Similarly, in *Burlington*, this

11. The fact that a list of the citations to *Rowley* runs 43 pages attests to its impact on the entire country. In *Rowley*, this Court specifically admonished the courts not to usurp the authority of administrative proceedings to resolve special education disputes. 458 U.S. at 206-208.

Court did not accept the case for review to determine the precise consequences for an individual student. Rather, this Court believed it necessary to define the limits of possible remedies for all students and school districts. Similarly, the present case is appropriate for review because a decision by this Court will provide a definitive ruling concerning the parameters of the dispute resolution *processes* for IDEA issues and the parameters for judicial intervention.

III. Review Is Required In Order To Define The Parameters For The Utilization Of Judicial Resources.

Separate and apart from the importance of this case to families and school districts, review of this case is warranted in order to define the appropriate use of judicial resources. While the substance of claims to be addressed in IDEA cases is largely educational, the precise issue to be addressed in this case actually concerns judicial administration and not education. This Court will not be intruding upon the educational domain but will be fulfilling its role as the final authority for defining the role of the judiciary.

The question is one of the jurisdictional power of the courts. A conflict in the jurisdictional prerequisites for bringing an action is among the most serious confronted by the judiciary. If the courts do not have jurisdiction over a matter, it is a gross abuse of process to allow judicial resources to be diverted even if the diversion occurs in only half the country.[12] On the other hand, if citizens have the

12. Respondents disregard this basic principle and even argued before the Second Circuit that they should be allowed to proceed with a trial and that all would benefit *even if* the trial court lacked jurisdiction. Affidavit in Opposition to Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) of Bruce A. Goldstein dated September 26, 2002.

right to utilize those resources, they should not be deprived of access even in only half the country. Similarly, school districts should be made defendants according to uniform criteria regardless of geographic location.

In short, this is an important question of federal law concerning the use of judicial resources which should be settled by this Court.

IV. Review Is Required In Order To Settle The Question Of Whether Or Not A Section 504 "Accessibility" Claim Concerning Special Education Is Subject To The Exhaustion Requirement.

All of Respondents' claims involve allegations concerning their complaints about the provision of special education by Petitioner. Their assertion that the so-called "first" Section 504 claim in paragraph 108 of the Complaint is exempt from the exhaustion requirement in 20 U.S.C. § 1415(l) is an important question which should be settled by this Court. The issue rests on a determination of whether or not the exhaustion requirement can be evaded by slicing out a portion of a special education lawsuit and trying to distinguish it from allegations subject to IDEA-type relief subject to 20 U.S.C. § 1415(l) by adding the moniker "accessibility" to some of the allegations.

Although such a distinction does not appear in the language of 20 U.S.C. § 1415(l), the rulings below that a reading of Section 504 supports a distinction call for a resolution of how the two statutes are to be applied. As with the first Question Presented in this case, it is important that the rules concerning the jurisdictional prerequisites for bringing such claims be clearly established. Similarly, the

issue of whether or not the "bad faith/gross misjudgment" standard applies to this type of Section 504 claim as well as other Section 504 special education claims requires resolution so that it is made clear whether or not all special education claims are subject to the same standards or whether "accessibility" claims are exempt from the otherwise applicable criteria.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED, AND ENTERED OCTOBER 6, 2004

386 F.3d 107, 2004 WL 2244235

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: December 3, 2003 Decided: October 6, 2004)

Docket No. 03-7170

J.S., hereinafter "John", by his parent and natural guardian; N.S., individually and on behalf of all others similarly situated; S.H., hereinafter "Sally" by her parent and natural guardian; C.H., Charles hereinafter by their parent and natural guardian; J.H., individually and on behalf of all others similarly situated; C.Z., hereinafter "Caroline" by their parent and natural guardian; K.Z., "Ken" hereinafter by their parent and natural guardian individually and on behalf of all situated; (HEREINAFTER "DENNIS"), BY HIS PARENT AND NATURAL GUARDIAN, S.E., ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellees,

-v-

ATTICA CENTRAL SCHOOLS,

Defendant - Appellant.

Appendix A

Before: CARDAMONE, SACK, and GIBSON,* *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York (William M. Skretny, *Judge*), denying defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (1) and (6), upon certification of the issue of subject matter jurisdiction for interlocutory appeal under 28 U.S.C. § 1292(b).

Affirmed and remanded.

John R. Gibson, *Judge*:

Six students who attend school in the Attica Central School District brought an action against the School District primarily alleging that they have been denied the provision of a free appropriate public education. They included claims under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, Section 1983, and related New York state education laws. The students sought equitable relief, costs and attorney's fees.[1] The School District filed a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The district court (William M. Skretny, *Judge*) denied the motion in its entirety but, upon the School District's request, certified the issue of subject

* The Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1. In their complaint, plaintiffs also asked for money damages, but they later struck that portion of their prayer.

matter jurisdiction for interlocutory appeal. On February 26, 2003, we agreed to hear it.

The School District argues on appeal that the students should have been required to exhaust their administrative remedies before bringing a federal court action. In its order denying the motion to dismiss, the district court concluded that the complaint alleged facts sufficient to establish subject matter jurisdiction. The district court reasoned that the School District's alleged systemic violations of the IDEA cannot be remedied through administrative proceedings, and therefore exhaustion would be futile. The complaint was styled as a class action, and the district court described it as containing "complain[ts] of wrongdoing that is inherent in the program itself and not directed at any individual child." The district court did not rule on the students' motion to certify the class, however, and they later withdrew that motion without prejudice pending this appeal.

On appeal of the district court's order on the motion to dismiss, we must accept as true all material factual allegations in the complaint, but we are not to draw inferences from the complaint favorable to plaintiffs. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). We may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but we may not rely on conclusory or hearsay statements contained in the affidavits. *Zappia Middle E. Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000); *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). The district court declined to consider any of the materials outside of the pleadings that either party submitted. Accordingly, we limit our review to the allegations in the complaint.

Appendix A

THE COMPLAINT

The complaint describes each plaintiff's alleged special education deprivations. Plaintiff J.S., or John, attends Attica Middle School in a class with twelve students, one special education teacher, and one aide. Attica Middle School is the only middle school in the School District. According to the School District's Committee on Special Education, John is multiply disabled. He has cerebral palsy, is mentally retarded, and has perceptual/visual motor deficits. These conditions make him physically handicapped, mobility-impaired, and dependent upon a wheelchair.

John is able to get in and out of the middle school only through the shop class, and he does not have adequate access to the school's computer room, nurse's office, weight room, home economics room, or swimming pool. He also does not have adequate or safe toilet access.

The School District has not provided John with an appropriate and adequate Individualized Education Program. The document lacks satisfactory goals and objectives, adaptive physical education, mobility training, and means to deal with John's visual/perception deficits. The School District does not provide John with appropriate transition services or sufficient progress reports, and it has failed to evaluate him and provide assistive technology services. John has not been provided an education in the least restrictive environment.

S.H., or Sally, attends Prospect Elementary School in a class with twelve students, one special education teacher,

and one aide. She is also classified as multiply disabled. She has cerebral palsy with seizure disorder, is mentally retarded, visually impaired, speech impaired, and is largely non-verbal. She is physically handicapped, mobility-impaired, and dependent upon a wheelchair. She uses "Total Communication" sign language and is assisted with equipment called a Dynavox.

Sally enters the elementary school through a ramped door that someone else has to open for her. She is able to reach only the first floor of the three-story school. She cannot go to the basement where the cafeteria is located, so she and her classmates eat lunch in their classroom. She has no access to the music room, the computer lab, or the school playground. Sally does not receive sufficient physical and occupational therapy, and her education is not in the least restrictive environment.

C.H., or Charles, attends Attica Senior High School in regular education classrooms. He is classified as learning disabled, and he receives resource room services and poorly implemented testing modifications. The School District has not developed an adequate transition plan for Charles or provided him with special education services that would allow him to benefit from his educational program. School staff have not been informed of or trained in implementing Charles's Individualized Education Program.

C.Z., or Caroline, attends Prospect Elementary School in a pre-first grade program for at-risk students. Although she receives special services from the School District, she is not classified under the IDEA. Caroline was tested and denied

special education because her scores were too high, but her parent was not given a copy of the test results. Caroline has been denied services she should receive as a learning disabled child.

K.Z., or Ken, attends Sheldon Elementary School as a fifth grade student in a regular education classroom. The School District's Committee on Special Education declassified him from his classification as speech impaired.

D.E., or Dennis, is enrolled at Attica Senior High School. He has a medical condition which defines him as a person with a disability under Section 504 of the Rehabilitation Act. Following his request, a hearing was held which resolved his complaints with respect to his condition.

In addition to describing the circumstances of each individual plaintiff, the complaint alleges twenty-seven separate ways in which the School District has failed to comply with its obligations to students who are or may be disabled, and to those students' parents. These allegations include failures to evaluate, to prepare or implement Individual Education Programs, to provide notice to parents, and to provide appropriate training.

I.

The Attica Central School District argues that the district court erred in failing to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b) (1). The district court determined that dismissal was unwarranted because the complaint falls within the "systemic violation" exemption

from the exhaustion requirement. In a motion to dismiss for lack of jurisdiction, we review *de novo* the district court's legal conclusions. *APWU v. Potter*, 343 F.3d 619, 623-24 (2d Cir. 2003).

It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court,[2] and the parties do not dispute the requirement. The process includes review by an impartial due process hearing officer and an appeal from that hearing. 20 U.S.C. § 1415(f) and (g). Parents may request a hearing to present complaints relating to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b) (6). In New York, upon notice of request to the school district, the local board of education appoints an impartial hearing officer under a rotational selection process. The hearing officer issues a written decision which can be appealed to a state review officer of the New York Education Department. The state review officer's decision is final. 8 N.Y.C.R.R. § 200.5(i), (j).

The exhaustion requirement also applies where plaintiffs seek relief under other federal statutes when relief is also available under the IDEA. 20 U.S.C. § 1415(1); *Hope v. Cortines*, 872 F. Supp. 14, 19 (E.D.N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995). As the district court correctly noted, the students asserted a section 504 Rehabilitation Act claim and a section 1983 claim that both seek to ensure a free

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2. 20 U.S.C. § 1415(i) (2) (2000); *Heldman v. Sobol*, 962 F.2d 148, 158 (2d Cir. 1992).

appropriate public education, thus subjecting both to the IDEA exhaustion requirement.

The requirement is excused, however, when exhaustion would be futile because the administrative procedures do not provide an adequate remedy. *E.g., Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 788-91 (2d Cir. 2002). The students bear the burden of proof that exhaustion would be futile. *Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 n.8 (2d Cir. 2002) (party asserting futility bears burden of proof).

Exhaustion of administrative remedies is required under the IDEA so that disputes related to the education of disabled children are first analyzed by administrators with expertise in the area who can promptly resolve grievances. *Polera*, 288 F.3d at 487.

> Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.

Id. (quoting *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992)). If the administrative process is not successful at resolving the dispute, it will at least have produced a helpful record because administrators versed in

the relevant issues were able to probe and illuminate those issues for the federal court. *Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir. 1981). As we analyze whether plaintiffs have proven that their case should not be subject to the exhaustion requirement, we are to consider whether administrative review would further the goals of developing facts, making use of available expertise, and promoting efficiency. *Hoeft*, 967 F.2d at 1303.

In response to the motion to dismiss, the students asserted that they were excused from exhaustion because of a "class action exception." The district court concluded that case law did not support the students' assertion and that, even if the exception did exist, the students would not be entitled to it because no class had been certified. However, the district court observed that the futility exception has been applied in cases of alleged systemic violations, and that such cases are often class actions. The court concluded that, because the complaint is aimed at "wrongdoing that is inherent in the program itself and not directed at any individual child," the allegations of systemic violations entitled them to exemption from the exhaustion requirement.

The district court correctly observed that this Court has previously excused exhaustion of administrative remedies in cases that included allegations of systemic violations. *Heldman v. Sobol*, 962 F.2d 148 (2d Cir. 1992); *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987); *J.G. v. Bd. of Educ. of the Rochester City Sch. Dist.*, 830 F.2d 444 (2d Cir. 1987); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982). In each of these cases, this Court concluded it would be futile to complete the administrative review process because the

hearing officer had no power to correct the violation. In *Heldman*, a father of a student with learning disabilities brought suit challenging the manner in which hearing officers are selected in New York because he thought the system had denied his son an impartial review of his Individualized Education Program. 962 F.2d at 151. This Court concluded that exhaustion was futile because the plaintiff was challenging a regulation implementing a state statute that neither the hearing officer nor the Commissioner of Education had the authority to alter. *Id.* at 159.

Tirozzi involved complaints filed with the Connecticut State Board of Education on behalf of groups of handicapped children who were not receiving adequate services. The plaintiffs believed the state's treatment of their complaints to be inadequate, and they filed suit in federal court seeking an injunction requiring the agency to formulate and implement adequate complaint resolution procedures. 832 F.2d at 752-53. This Court concluded that the alleged systemic violations could not be remedied by hearing officers and were of a kind for which an administrative record would not be of value to the district court. The alleged deficiencies were in the existing administrative scheme, and this Court held that exhaustion was therefore futile. *Id.* at 756-57.

A class action brought by a class of handicapped students against a local school district was settled, and the district appealed the district court's award of attorney's fees in *J.G.* The district argued that the class was statutorily precluded from recovering its fees because it had not exhausted its administrative remedies. 830 F.2d at 446. This Court concluded that the allegations were of wrongdoing inherent

in the program, which included failure to evaluate and place students, failure to develop individualized education programs, and failure to inform parents of their rights. *Id.* at 446-47. Moreover, the settlement "went far beyond and accomplished much more than what could have been accomplished through administrative hearings." *Id.* at 447.

In *Jose P.*, another class action, plaintiffs sought structural reform of the New York state and city educational systems to allow more timely evaluation and placement of handicapped children in appropriate programs. 669 F.2d at 867. The city's commissioner of education conceded that he could not foresee expeditious handling of the thousands of appeals at issue, and the state's bureaucratic system was not likely to lead to resolution. Accordingly, this Court held that resorting to administrative remedies would be futile. *Id.* at 869.

The common element among these four cases is that the plaintiffs' problems could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process. If each plaintiff had been forced to take his or her claim before a hearing officer and appeal to another local or state official, there would have been a high probability of inconsistent results. Moreover, the plaintiffs' claims were such that an administrative record would not have been of substantial benefit to the district court.

The School District argues that these cases are distinguishable and that instead we should be guided by the reasoning of *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995). In *Hope*, parents of a child with a learning disability requested a hearing because they were dissatisfied with the Individualized Education Program that had been developed for her. The hearing was started but adjourned. Before its resumption, the parents filed suit in federal court alleging violations of the Americans with Disabilities Act, civil rights laws, and the New York Human Rights Law. They did not bring a claim under the IDEA. The district court conducted a hearing on the parents' preliminary injunction motion and dismissed the complaint for lack of subject matter jurisdiction. 872 F. Supp. at 16.

The district court in *Hope* concluded that all of plaintiffs' claims were subject to the IDEA's exhaustion requirement because each claim sought relief that is available under the IDEA. *See* 20 U.S.C. § 1415(f) (before filing suit seeking relief under any federal statute protecting the rights of children and youth with disability, if the relief sought is also available under the IDEA, plaintiff must exhaust administrative remedies). The district court examined the exceptions to the exhaustion requirement *sua sponte*, and it found that none applied. 872 F. Supp. at 22-23. This Court affirmed the district court's "thorough, thoughtful opinion." 69 F.3d 687, 688 (2d Cir. 1995).

Appendix A

The district court in *Hope* also considered the purposes of exhaustion.

> Plaintiffs in substance challenge the adequacy of the IEP created for [the student] and seek imposition of their own more expansive IEP. This is precisely the type of remedy best fashioned by the educational experts skilled in developing such programs and provides a textbook example of the types of cases justifying administrative exhaustion.

872 F. Supp. at 21. We acknowledge *Hope*'s recognition of the importance of exhaustion in "textbook" cases presenting issues involving individual children where the remedy is best left to educational experts operating within the framework of the local and state review procedures. However, the complaint in this case does not allow us to conclude that this is such a "textbook" case — at least not at this stage of the proceedings. The district court made clear that the complaint does not challenge the content of Individualized Education Programs, but rather the School District's total failure to prepare and implement Individualized Education Programs. The district court also enumerated three more examples in the complaint of allegations of systemic problems: the School District's alleged failure to notify parents of meetings as required by law; its alleged failure to provide parents with legally required progress reports; and its alleged failure to provide appropriate training to school staff. Further, the complaint contains additional allegations of systemic problems, including failure to perform timely evaluations and reevaluations of disabled children; failure to provide parents

with required procedural safeguards regarding identification, evaluation, and accommodation of otherwise disabled children; and failure to perform legally required responsibilities in a timely manner, including providing and implementing transition plans, transitional support services, assistive technology services, and declassification services for children with disabilities.

As we consider the order denying the School District's motion to dismiss, we are mindful that we "must assume the truth of all facts pleaded by the party opposing the motion and read the record in a light most favorable to that party." *Tirozzi*, 832 F.2d at 757. We are persuaded that the district court correctly applied the law with respect to exhaustion to the allegations of the complaint, and we affirm the district court's denial of the Rule 12(b) (1) motion to dismiss the IDEA claim.

II.

The district court certified only the subject matter jurisdiction issue for interlocutory appeal and denied the School District's motion insofar as it sought certification of the district court's ruling on the sufficiency of plaintiffs' Section 504 and Section 1983 claims. We are not necessarily limited to the certified issue, as we have the discretion to consider any aspect of the order from which the appeal is taken. *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 859 F.2d 242, 249 & n.6 (2d Cir. 1988); *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1219-20 (11th Cir. 2001) ("[T]he district court's order, not the certified question, is brought before the court on a §1292(b) appeal, and this court's jurisdiction

is not confined to the precise question certified by the district court.").

Plaintiffs' complaint includes four counts in addition to the IDEA count. All five counts, however, are based on the same set of factual allegations. Plaintiffs allege that the School District's failures concomitantly constitute violations of their rights to a free appropriate public education under the IDEA, Section 504 of the Rehabilitation Act, and provisions of the New York Education Law;[3] deprivation of physical access to school facilities under Section 504; and violations of due process and/or equal protection rights that are actionable under Section 1983. Because the claims are so closely related, the most efficient resolution is for us to exercise our discretion in favor of considering all of them.

The School District argues that the Section 504 claims and the Section 1983 claim should be dismissed for failure to exhaust. In the alternative, the School District argues that they should be dismissed pursuant to Rule 12(b) (6) for failure to state a claim. We first consider whether the IDEA's exhaustion requirement also applies to these other counts. The relevant portion of the statute gives some guidance:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act . . . , title V of the Rehabilitation Act . . . , or other Federal laws

3. The School District does not argue that the state law claim is subject to dismissal under Rule 12 (b) (6) for failure to state a claim.

> protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(1). Thus, if plaintiffs' other claims seek relief that is also available under the IDEA, they too are subject to exhaustion analysis.

Plaintiffs acknowledge that our ruling on their IDEA claim will apply to their second Section 504 claim, which seeks relief for failure to provide a free appropriate public education. Because their Section 1983 claim likewise seeks relief based on the same alleged failure, it too will be governed by the same ruling. Accordingly, we affirm the district court's denial of the School District's Rule 12(b) (1) motion to dismiss the complaint's second Section 504 claim and its Section 1983 claim.

The district court applied the correct standard in its consideration of the School District's Rule 12(b) (6) motion to dismiss the Section 504 counts and the Section 1983 count. On appeal, we too must assume the truth of the allegations of the complaint, read the record in the light most favorable to plaintiffs, and draw all inferences in their favor. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 757 (2d Cir. 1987). We have reviewed the district court's Rule 12(b) (6) ruling and, finding no error, we affirm.

Appendix A

CONCLUSION

The district court correctly ruled that the students' complaint is not subject to dismissal under Rules 12(b) (1) or (6). We affirm the judgment and remand for further proceedings.

APPENDIX B— ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, GRANTING MOTION FOR LEAVE TO APPEAL FILED AND ENTERED FEBRUARY 26, 2003

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

W.D.N.Y.
00-cv-513
Skretny, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February two thousand and three,

Present:

Hon. Chester J. Straub,
Hon. Robert A. Katzmann,
Hon. Reena Raggi,
Circuit Judges,

Appendix B

02-8021

J.S.,

Plaintiffs-Appellees,

v.

Attica Central School District,

Defendant-Appellant.

Appellant petitions, pursuant to 28 U.S.C. § 1292(b), for leave to appeal the district court order denying its motion to dismiss the appellee's complaint. Upon due consideration, it is ORDERED that the petition is GRANTED. Appellant has demonstrated that the district court order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [district court] order may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b).

FOR THE COURT:

Roseann B. Mackechnie, Clerk

By: s/ Lucille Carr

APPENDIX C — ORDER OF THE HONORABLE WILLIAM M. SKRETNY WITHDRAWING THE MOTION TO CERTIFY THE CLASS DATED FEBRUARY 11, 2003 (ENTERED ON THE WESTERN DISTRICT DOCKET ON FEBRUARY 11, 2003)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ORDER
00-CV -513S

J.S., et al.,

Plaintiffs,

v.

ATTICA CENTRAL SCHOOLS,

Defendant.

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1. Plaintiffs commenced this action on June 14, 2000. On that same date, Plaintiffs filed a Motion to Certify the Class.

2. On August 15, 2000, Defendant filed a Motion to Dismiss, arguing *inter alia* that Plaintiffs had not exhausted their administrative remedies and, as such, this Court lacked subject matter jurisdiction.

3. On September 30, 2001, this Court denied Defendant's Motion to Dismiss in its entirety.

4. On October 29, 2001, Defendant moved for certification to file an interlocutory appeal to the United States Court of Appeals for the Second Circuit.

5. On September 5, 2002, this Court granted Defendant's Motion to Certify the issue of subject matter jurisdiction for interlocutory appeal.

6. At a status conference held on February 7, 2003, counsel for Defendant represented that an application for leave to appeal was filed with the Second Circuit in September 2002 and was currently pending before that court.

7. This Court cannot address the merits of Plaintiffs' Motion to Certify the Class until the application pending before the Second Circuit is resolved by that court.

8. At the February 7, 2003 status conference, this Court noted that Plaintiffs' Motion to Certify the Class was filed almost three years ago. As such, it is necessary that a new motion be filed so as to supplement the underlying facts and/or address recent developments in the case law regarding class certification.

9. Moreover, in that an appeal to the Second Circuit is pending on the issue of whether this Court has subject matter jurisdiction in this case, Plaintiffs are permitted to withdraw the class certification motion without prejudice and without objection from Defendant as to its timeliness upon refiling.

Appendix C

IT HEREBY IS ORDERED that Plaintiffs' Motion to Certify the Class (Docket No. 2) is WITHDRAWN without prejudice and with leave to re-file *nunc pro tunc* to the date of original filing without objection of Defendant to its timeliness upon a determination by the Second Circuit that this Court has subject matter jurisdiction in this case.

FURTHER, that counsel for the parties shall meet with this Court on Friday, April 11, 2003 at 9:00 a.m., in Part IV, United States Courthouse, 68 Court Street, Buffalo, New York for a status conference.

FURTHER, out of town counsel may appear by telephone if they contact my chambers at (716) 551-3108 with a telephone number at which they may be reached for the conference by April 1, 2003.

SO ORDERED.

Dated: February 11, 2003
Buffalo, New York

s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX D — DECISION AND ORDER OF THE HONORABLE WILLIAM M. SKRETNY, DATED SEPTEMBER 3, 2002, GRANTING CERTIFICATION FOR INTERLUCTORY APPEAL UNDER 20 U.S.C. § 1292(b) (ENTERED BY THE WESTERN DISTRICT ON SEPTEMBER 9, 2002)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECISION AND ORDER
00-CV-513S

J.S. BY HIS PARENT AND NATURAL GUARDIAN, N.S., ET AL.,

Plaintiffs,

ATTICA CENTRAL SCHOOLS,

Defendant.

INTRODUCTION

Plaintiffs commenced this action on June 14, 2000, seeking declaratory, injunctive, and monetary relief from Defendant for alleged violations of statutory obligations due to students who are educationally, physically, or otherwise disabled or suspected of being disabled.

On August 15, 2000, Defendant filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) alleging that this Court lacked subject matter jurisdiction in this case, and that Plaintiffs failed to state a

claim upon which relief could be granted. On September 30, 2001, this Court denied Defendant's motion. Subsequently, on October 29, 2001, Defendant brought this Motion for Certification of Appeal on both of the claims it raised in its Motion to Dismiss.[1]

For the reasons stated below, this Court will grant Defendant's Motion to Certify its claim that this Court lacks subject matter jurisdiction, and deny Defendant's Motion to Certify the issue of whether Plaintiffs' 29 U.S.C. §794 ("Section 504") and 42 U.S.C. §1983 ("Section 1983") claims should be dismissed for failure to state claims upon which relief can be granted.

BACKGROUND[2]

Defendant seeks certification pursuant to 28 U.S.C. § 1292(b) for an interlocutory appeal of this Court's Decision and Order on its Motion to Dismiss. First, Defendant argues that this Court erred in finding that Plaintiffs are exempt from the administrative exhaustion requirement of the Individuals with Disabilities Educational Act ("IDEA") because they allege systemic violations. Defendant contends that this Court lacks subject matter jurisdiction over this matter because of

1. In Support of its Motion for Certification of Appeal, Defendant submitted a Notice of Motion, the Affidavit of Joseph Rosetti, a Memorandum of Law, and a Reply Memorandum of Law. In opposition to Defendant's motion, Plaintiffs submitted a Memorandum of Law and Affidavit of Bruce Goldstein.

2. For a complete recitation of the facts, see this Court's September 30, 2001, Decision and Order (Docket No. 20). Familiarity with it is assumed.

Plaintiffs' failure to exhaust.[3] Defendant alleges that case law does not support the notion that the "systemic violations" exception applies when the violations are alleged against a local school district and not the state; at the least, Defendant contends that case law is conflicting on this issue.

Second, Defendant argues that this Court erred in finding Plaintiff's pleadings sufficient to allege their Section 504 and Section 1983 claims. Defendant contends that Plaintiffs' pleadings were insufficient because they failed to make certain "required" allegations, *e.g.* bad faith, gross misjudgment, and deliberate indifference. Consequently, Defendant contends that Plaintiffs failed to state claims upon which relief could be granted.

In response, Plaintiffs argue that Defendant has not met the requirements necessary for this Court to certify its Decision and Order for appeal pursuant to 28 U.S.C. § 1292(b).

DISCUSSION

A. Standard for Certification of an Interlocutory Appeal under 28 U.S.C. § 1292(b)

Under 28 U.S.C. §1292(b), a district judge may certify an order for appeal when three requirements are met: (1) a controlling question of law is involved, (2) there is a

3. Defendant maintains that Plaintiffs did not exhaust their administrative remedies (and Plaintiffs admit as much), and further that Plaintiffs do not meet any of the exceptions from the exhaustion requirement of the IDEA.

substantial ground for difference of opinion on that question, and (3) an immediate appeal on the issue would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. §1292(b); *see also, e.g., Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959).

A controlling question of law is one that could terminate the immediate action, or may contribute to termination, at an early stage, of a wide spectrum of cases. *See Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97, 99 (S.D.N.Y. 1995); *Department of Economic Dev. v. Arthur Anderson & Co. (U.S.A.)*, 683 F.Supp. 1463, 1486 (S.D.N.Y. 1988). A substantial ground for difference of opinion on a question of law may be said to exist when a controlling court's decisions are in conflict, or where the law is indefinite as to the proper resolution of the issue. *See Walker v. Eastern Air Lines, Inc.*, 785 F.Supp. 1168, 1174 (S.D.N.Y. 1992); *Keogh v. Pearson*, 244 F.Supp 482, 486 (D.D.C. 1965). An immediate appeal materially advances the litigation when early appellate review might avoid protracted and expensive litigation. *See Abortion Rights Mobilization, Inc. v. Regan*, 552 F.Supp. 364, 366 (S.D.N.Y. 1982). It is not enough that certification will not slow down ongoing litigation, it must materially advance the litigation. *See Genentech*, 907 F.Supp. at 100.

Generally, certification for an interlocutory appeal should be granted on a very limited basis and only in exceptional circumstances. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990). An immediate appeal is not proper to provide early review of difficult rulings in hard cases nor is it appropriate for securing early resolution of disputes

concerning whether the trial court properly applied the law to the facts. *See Abortion Rights Mobilization*, 552 F.Supp. at 366.

B. Lack of Subject Matter Jurisdiction

In this Court's view, the issue of whether this Court has subject matter jurisdiction is ripe for certification. First, questions of subject matter jurisdiction are generally considered controlling because their resolution may dispose of a case or a group of cases. *See, e.g., Genentech, Inc.*, 907 F.Supp. at 99. In this action, should the Court of Appeals find that this Court lacks subject matter jurisdiction because Plaintiffs have not exhausted their administrative remedies, most of Plaintiffs' claims would be dismissed. Further, resolution of the question of whether or not the "systemic violations" exception to the exhaustion requirement applies in an action against a local school district may lead to the termination of a wide spectrum of cases at an early stage. That is, in any case in which the exhaustion requirement of the IDEA is at issue, plaintiffs would be on notice that they must exhaust administrative remedies before a district court has subject matter jurisdiction.

Second, Defendant's interpretation of, among other cases, *Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995), suggests that there may be substantial ground for a difference of opinion. At the least, Defendant's interpretation suggests that the law may be indefinite as to the resolution of the question of whether the "systemic violations" exception applies against a local school district. Although this Court did not accept Defendant's view, when taken in conjunction with the

importance of subject matter jurisdiction, certification for clarification of this issue by the Court of Appeals seems appropriate.

Third, certification may materially advance this litigation because resolution in Defendant's favor would prevent lengthy and expensive discovery and litigation on issues not properly before this Court. Additionally, resolution of this issue at this stage in Plaintiffs favor would ensure that their resources are not expended in vain litigating issues found at a later stage to be improperly before this Court. Moreover, resolution of this issue in either direction would still allow Plaintiffs to seek a remedy in an appropriate forum, whether that forum continues to be this Court, or a state administrative agency.

C. Failure to State a Claim upon which Relief may be Granted

In this Court's view, its rulings on the adequacy of Plaintiffs' pleadings is not appropriate for interlocutory appeal. First and foremost, this is an issue that involves this Court's application of facts to the law and is therefore not an issue that is proper for interlocutory appeal. *See Abortion Rights Mobilization*, 552 F.Supp. at 366. That is to say, there is no substantial ground for a difference of opinion, but instead a difference of opinion between this Court and Defendant as to how established, existing law should be applied in this case. Also, certification of this issue would not materially advance this litigation. Therefore, this issue will not be certified for appeal at this time.

Appendix D

CONCLUSION

This Court will grant Defendant's Motion to Certify for interlocutory appeal the issue of whether this Court has subject matter jurisdiction. However, Defendant's Motion to Certify on the sufficiency of Plaintiffs' pleadings will be denied.

ORDERS

IT HEREBY IS ORDERED, that Defendant's Motion for Certification of Appeal (Docket No. 22) is granted in part and denied in part.

FURTHER, that the Clerk of the Court is directed to take the necessary steps to certify the issue of whether or not this Court lacks subject matter jurisdiction to the Second Circuit Court of Appeals.

SO ORDERED.

Dated: September 3, 2002
Buffalo, New York

s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX E — DECISION AND ORDER OF THE HONORABLE WILLIAM M. SKRETNY DATED SEPTEMBER 30, 2001, DENYING THE DEFENDANT'S MOTION TO DISMISS (ENTERED ON THE WESTERN DISTRICT DOCKET ON OCTOBER 1, 2001)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECISION AND ORDER
00-CV-513S

J.S. BY HIS PARENT AND NATURAL GUARDIAN, N.S., et al.,

Plaintiffs,

ATTICA CENTRAL SCHOOLS,

Defendant.

INTRODUCTION

Plaintiffs commenced this action on June 14, 2000. Plaintiffs are six disabled students attending public schools within the Attica Central School District. In their Complaint, Plaintiffs allege violations of statutory and regulatory obligations to students who are educationally, physically, or otherwise disabled or suspected of being disabled. Plaintiffs' claims arise under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 ("Section 504"), 42 U.S.C. §1983 ("Section 1983"), and corresponding state

law claims.[1] Plaintiffs seek declaratory, injunctive, and monetary relief.

On August 15, 2000, Defendant brought this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and, in the alternative, for summary judgment pursuant to Rule 56.[2] First, Defendant claims that Plaintiffs' claims must be dismissed on jurisdictional grounds because they have failed to exhaust administrative remedies, a necessary prerequisite to any action based upon the IDEA. Next, Defendant seeks to dismiss the Section 504 and Section 1983 claims for failure to state a claim upon which relief may be granted. In the alternative, Defendant moves for summary judgment pursuant to Rule 56, in the event that this Court considers matters outside of the pleadings.

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1. The State law claims include: New York's compulsory attendance law, New York Education Law §3208 and Article 89, §440, governing the provision of education to children with disabilities, §1 of Article 11 of New York State's constitution, as well as 8 NYCRR Part 200 and 2001. Compl. ¶¶112-114.

2. In support of its motion, Defendant filed a Memorandum of Law in Support of Defendant's Motion to Dismiss ("Def.'s Mem. Supp. Mot. Dismiss"); a Reply Memorandum of Law in Support of Defendant's Motion to Dismiss ("Def.'s Reply Mem. Supp. Mot. Dismiss"); Attorney Affidavit of Daniel Moore ("Moore Aff."); Affidavit of Jeanne Bates ("Bates Aff."). In opposition to Defendant's Motion to Dismiss, Plaintiffs filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss with exhibits ("Pl.'s Mem. Opp'n. Def.'s Mot. Dismiss"); Attorney Affidavit of Bruce Goldstein ("Goldstein Aff."); Affidavit of Elizabeth Wright ("Wright Aff."); Attorney Affidavit of Jay Pletcher ("Pletcher Aff."); Affidavit of Melinda Saran ("Saran Aff.").

Appendix E

This Court heard oral argument on Defendant's Motion on November 13, 2000. For the reasons set forth below, this Court will not consider Defendant's Motion as one for summary judgment at this time. Further, this Court denies Defendant's Motion to dismiss in its entirety.

BACKGROUND

Plaintiffs are six students attending public schools within the Attica Central School District. Compl. ¶ 2. Plaintiffs are educationally, physically, or otherwise disabled or suspected of being disabled. *Id.* The action is brought on behalf of these students by their parents and natural guardians. *Id.*

Plaintiffs bring claims under the IDEA, Section 504, Section 1983, and corresponding state law that is designed to ensure an appropriate education at public expense for disabled school children. *Id. at* ¶¶ 105-118. In brief, Plaintiffs allege that "Defendant's policies, procedures and practices, including inaccessible facilities," serve to "deny the provision of a free appropriate public education to educationally and otherwise disabled children who attend public school in the Attica Central Schools and/or who are entitled to service" from the Defendant school district. *Id.* at ¶¶ 1, 14. Plaintiffs allege systemic violations including a failure to meet statutory and regulatory obligations to Plaintiffs, a failure to provide facilities appropriately accessible to students with physical disabilities, and implementation of defective procedures, including the lack of timely and appropriate evaluation and placement of students. *Id.* at ¶¶ 3-5.

Appendix E

Defendant contends that the Plaintiffs' failure to exhaust the administrative remedies available to them under New York State law leaves this Court with no jurisdictional basis to entertain Plaintiff's action, and consequently the Complaint should be dismissed on its face pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Def.'s Mem. Supp. Mot. Dismiss at 3, 7, 8, 30. Further, Defendant urges this Court to decline to exercise jurisdiction over any remaining State law claims once the federal claims are dismissed. *Id.* at 5. Conversely, Plaintiffs claim that the well-defined futility exception to the exhaustion requirement applies to their claim because the Complaint alleges systemic violations. Pl.'s Mem. Opp'n. Def.'s Mot. Dismiss at 3, 6, 26.

Next, Defendant claims that Plaintiffs' Section 504 and Section 1983 claims should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Def.'s Mem. Supp. Mot. Dismiss. at 33. In specific, Defendant claims that "an action under Section 504 lies only where there is bad faith or gross misjudgment" and, therefore, Plaintiffs' Section 504 claim must be dismissed because Plaintiffs does not specifically allege bad faith or gross misjudgement. *Id.* at 34. In a similar vein, Defendant claims that "an action lies under Section 1983 only where there is deliberate indifference" and Plaintiffs' Section 1983 claim should consequently be dismissed because the Complaint does not specifically allege deliberate indifference. *Id.* at 33. In the alternative, Defendant moves for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting defendant summary judgment "[i]n the event the Court considers matters outside of the pleading." Def.'s Notice of Mot. 2.

Appendix E

DISCUSSION

As a preliminary matter, this Court will address the nature of Defendant's motion. Defendant styles this motion as one for dismissal or summary judgment. Despite the fact that Plaintiffs have not had a chance to conduct adequate discovery in this case, both Defendant and Plaintiffs have attached materials outside of the pleadings to their submissions in this case. This Court finds that it would be prejudicial to rely on materials outside of the pleadings when Plaintiffs have had no formal opportunity to conduct discovery. Therefore, this Court will not consider Defendant's Motion as one for summary judgement at this time.[3] *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) (stating that when materials outside the pleadings are submitted on a 12(b)(6) motion, courts have the option of excluding material or converting motion to one for summary judgement); *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988) (same).

In accordance with this determination, this Court will not consider Defendant's motion as one for summary judgement and will only consider Defendant's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

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3. Defendant is not precluded from filing a summary judgment motion regarding any remaining claims at the appropriate time after discovery.

Appendix E

I. *Dismissal Pursuant to Rule 12(b)(1)*

A. *Exhaustion requirement under the IDEA*

Defendant correctly contends that the IDEA requires the exhaustion of administrative remedies before an aggrieved party is entitled to bring a civil action in state or federal court. 20 U.S.C. §1415(i)(2). The IDEA provides for two levels of administrative review: an impartial due process hearing officer and an appeal. 20 U.S.C. §1415(f) and (g). Under the IDEA, a decision made in an impartial due process hearing may be appealed to the second level of administrative review. 20 U.S.C. §1415(i)(l). Under the implementing New York law and regulation, that appeal is to the State Review Officer ("SRO"). 8 N.Y.C.R.R. §200.5(j). The decision of the SRO is final except that a civil action may be commenced after these administrative remedies have been exhausted. 20 U.S.C. §1415(i)(1) and (2). Actions brought under the IDEA normally must adhere to the exhaustion requirement. *Heldman v. Sobol*, 872 F.2d 148, 158 (2d Cir. 1992).

Moreover, exhaustion of administrative remedies is required where relief is sought under other federal statutes but is also available under the IDEA. *Hope v. Cortines*, 872 F.Supp. 14, 19 (E.D.N.Y. 1995), *aff'd*, 69 F.3d 687 (2d Cir. 1995). In the instant action, this would render Plaintiffs' Section 504 and Section 1983 claims subject to the IDEA exhaustion requirement because both of these claims seek relief that is available under the IDEA, namely, ensuring a free appropriate public education.[4]

4. This Court notes that Plaintiffs also seek relief under Section 504 that is not available under the IDEA: correcting the physical (Cont'd)

However, the case law has carved out an exception to the exhaustion requirement in situations in which exhaustion would be futile because administrative procedures do not provide adequate remedies. *See Honig v. Doe*, 484 U.S. 305, 310-312, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988) (permitting civil action pursuant to 20 U.S.C. §1415 to be brought directly in federal district court without exhausting administrative remedies); *J.G. v. Board of Educ.*, 830 F.2d 444, 446-47 (2d. Cir. 1987). This futility exception to the IDEA exhaustion requirement can be traced directly to the legislative history of the 1975 Act. Senator Harrison Williams, author and floor manager of the Senate bill, stated that "exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing action in cases where such exhaustion would be futile either as a legal or practical matter." 121 Cong. Rec. 37416 (1975). Therefore, barring an exception to the exhaustion requirement, Plaintiffs are not entitled to judicial relief for the alleged injuries at this time.

(Cont'd)

accessibility of school district properties. Compl. ¶¶107, 108. Such issues regarding physical accessibility for disabled students are not covered by the IDEA, which only assures the free appropriate public education for disabled children and does not address either barrier removal or physical accessibility. *See Monahan v. Nebraska*, 687 F.2 1164, 1170-71 (8th Cir. 1982). However, Plaintiffs do have a second Section 504 claim that is coextensive with the IDEA, addressing free appropriate education requirements, and this claim is thus subject to the administrative exhaustion requirement. *See* Compl. ¶¶109-110. Thus, Plaintiffs have a separate claim under Section 504 in their first Section 504 claim that is not coextensive with the IDEA and consequently is not subject to the IDEA exhaustion requirement.

Appendix E

Defendant argues that no exception applies in this case. Def.'s Mem. Supp. Mot. Dismiss at 3 and 16. Plaintiffs conversely claim that they are excused from exhaustion because they are a class alleging systemic violations. Pl.'s Mem. Opp'n. Def.'s Mot. Dismiss at 2-5. Plaintiffs argue the existence of a "class action exception" to the exhaustion requirement. *Id.* While the case law does not support a class action exception per se, the futility exception is applied in cases of alleged systemic violations, for which the class action happens to be a common and useful vehicle. *See, e.g., Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982) (allowing a class action to proceed under the EHA, predecessor to the IDEA, without exhaustion of remedies because plaintiffs sufficiently alleged systemic violations). Thus the exception is not specific to the class action, but depends on the type of claims presented in the action.[5] Although the Plaintiffs are not exempted by reason of a class action, this Court does find that Plaintiffs' allegations of systemic violations do entitle them to an exemption from exhaustion of administrative remedies.

The futility exception has been deemed particularly relevant in actions that allege systemic violations. *J.G. v. Board of Educ.*, 830 F.2d 444, 446-47 (2d Cir. 1987).

5. Moreover, even if there were a class action exception to the exhaustion requirement, this exception would not save Plaintiffs' claim because this Court has not yet certified the class and the certification issue is not presently before this Court. Plaintiff's submitted their Motion for Class Certification on June 14, 2000. This Court deems it premature to consider the issue of class certification before the issue of dismissal, because deciding the issue of class certification is not necessary in order for the Court to resolve Defendant's Motion to Dismiss.

Appendix E

The court in *J.G.* determined the alleged violations to be systemic because "the wrongdoing complained of [was] inherent in the program for the education of handicapped children . . . and [was] not directed against any specific child." *Id.* at 446. Plaintiffs in this action similarly complain of wrongdoing that is inherent in the program itself and not directed at any individual child. For example, Plaintiffs allege that Defendant has failed to prepare and implement adequate Individual Education Programs ("IEPs"). Compl. ¶81. Plaintiffs do not challenge the content of the IEPs for each child; rather, Plaintiffs allege a total failure even to prepare and implement IEPs. Thus, the instant action is distinguishable from cases cited by Defendant, in which courts have declined to exercise subject matter jurisdiction over cases involving technical challenges to the substantive content of an individual child's IEP. *See, e.g., Hope v. Cortines*, 872 F. Supp. 14, 19 (E.D.N.Y. 1995), *aff'd*, 69 F.3d 687 (2d Cir. 1995) (holding that a challenge to the adequacy of the technical determinations comprising an individual child's IEP is the type of challenge best handled by educational experts at the administrative level). Plaintiffs' other allegations are also arguably more systemic in nature, including the alleged failure to notify parents of meetings as required by law, Compl. ¶96, and the alleged failure to provide parents with legally required progress reports, Compl. ¶100, and the alleged failure to provide appropriate training to school staff, Compl. ¶103. These allegations are systemic because the wrongdoing complained of is inherent in the program for the education of handicapped children and is not aimed at any individual child.

Appendix E

This Court finds that Plaintiffs have sufficiently alleged systemic violations entitling them to an exemption from the required exhaustion of administrative remedies. Therefore, Defendant's Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction is denied.

II. *Dismissal Pursuant to Rule 12(b)(6)*

A court may grant a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim only if it appears that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). A court must read the complaint generously accepting as true the factual allegations in the complaint and drawing all inferences in favor of the plaintiff. *Desiderio v. National Ass'n of §Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir. 1999). This standard is applied "with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991). Therefore, this Court will apply this standard to Plaintiffs' Section 504 and Section 1983 claims.

A. *Plaintiffs' Section 504 claims*

Plaintiffs bring two separate claims under Section 504. Plaintiffs' first Section 504 claim alleges deprivation of appropriate accessibility to essential services and programming. Compl. ¶108. Plaintiffs' second Section 504 claim alleges failure to provide a free appropriate public education and reasonable accommodations. Compl. ¶110. Defendant argues that Plaintiffs' Section 504 claims should

be dismissed pursuant to Rule 12(b)(6), because Plaintiffs have not specifically alleged bad faith or gross misjudgement. Def.'s Mem. Supp. Mot. Dismiss 34. Defendant's argument, which fails to differentiate between Plaintiffs' two separate Section 504 claims, is unavailing.

Section 504 prohibits discrimination based on disability. *See* 29 U.S.C. §794 ("[N]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."). In order to establish a violation of Section 504, a plaintiff must prove that (1) he or she is a "handicapped person" under the Act, (2) that he or she is "otherwise qualified" for the benefits sought, (3) that he or she is being excluded solely by reason of his or her handicap, and (4) that the program or activity receives Federal financial assistance. *Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981). Defendant does not contest any of these elements. Moreover, this Court finds that Plaintiffs have sufficiently pleaded these elements. Therefore, Defendant's Motion to Dismiss Plaintiffs' first Section 504 claim is dismissed.

An additional requirement exists for the second Section 504 claim. Of particular significance for Plaintiffs' second Section 504 claim is the fact that the regulations implementing Section 504 are similar to those of the IDEA and place parallel requirements on schools to provide special education and related services. *See R. B. v. Board of Educ. of the City of New York*, 99 F. Supp. 2d 411, 419 (S.D.N.Y. 2000) (citing 34 C.F.R. §§104.33-104.37). When a Section

504 claim is brought in order to ensure a free appropriate public education, "a plaintiff must demonstrate more than an incorrect evaluation or substantively faulty IEP to establish liability; a plaintiff must show that defendants acted with bad faith or gross misjudgment." *Id.*

Again, Defendant fails to differentiate between Plaintiffs' two separate Section 504 claims. The first of Plaintiffs' two Section 504 claims is based only upon an alleged failure to provide appropriate physical accessibility. As stated above, this Court finds that Plaintiffs have sufficiently pleaded a cause of action for their first Section 504 claim, and Defendant does not contest any of those elements. The second of Plaintiffs' two separate Section 504 claims seeks to ensure a free appropriate public education. Therefore, only Plaintiffs' second Section 504 claim requires a showing of bad faith or gross misjudgment.

Plaintiffs' second Section 504 claim is based upon more than an incorrect evaluation or substantively faulty IEP, consistent with the admonition in *R.B.* This second Section 504 claim, like the IDEA claim preceding it, is based upon alleged systemic violations including the failure to provide evaluations and IEPs. Simply put, Plaintiffs do not take issue with the *content* of students' evaluations; rather, they argue that Defendant did not even *provide* timely evaluations. This Court finds that Plaintiffs have alleged more than incorrect evaluations or substantively faulty IEPs in support of their second Section 504 claim. In so doing, Plaintiffs' allegations of systemic violations can support an inference of bad faith or gross misjudgement sufficient to survive Defendant's Motion to Dismiss. *See R.B.*, 99 F.Supp. 2d at

419 (holding that allegations of defendant school district's failure to implement an IEP, along with other failures to promptly develop service plans for a disabled student, were sufficient to support an allegation of bad faith and gross misjudgement). Therefore, Defendant's Motion to Dismiss Plaintiffs' second Section 504 claim is denied.

B. *Plaintiffs' Section 1983 claims*

Plaintiffs bring a claim under 42 U.S.C. §1983 to remedy alleged violations of their rights guaranteed by the equal protection clause and due process clause of the Fourteenth Amendment, the IDEA, and Section 504. Defendant's sole contention with respect to this broad claim is that the Complaint does not allege deliberate indifference and therefore the Section 1983 claims must be dismissed.

A municipality can be liable under Section 1983 only where its policies or customs are the moving force behind the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978)). In *City of Canton*, the Supreme Court held that when a plaintiff's Section 1983 claim against a municipality is based upon a "failure to train its employees," the failure to train must rise to the level of deliberate indifference before that failure can be considered a policy that is actionable under Section 1983. *Id.* However, Plaintiffs in this case do not base their Section 1983 claim upon a failure to train municipal employees. In fact, of the twenty eight separate factual allegations included in the Compl.

¶¶ 77-104, only three, ¶¶97, 98 and 103, allege a failure to adequately train employees. The overwhelming majority of the factual allegations cite purported failures to provide services and facilities as required by law. Because Plaintiffs' Section 1983 claim is not based upon a failure to train employees theory the pleading of deliberate indifference is not required.

Of particular relevance in the determination of whether Plaintiffs have sufficiently pleaded a cause of action under Section 1983 is Plaintiffs' allegation that "customs" exist which "have had, and are having, a similar impact upon [Plaintiffs]." Compl. ¶ 14. An aggrieved party may establish municipal liability under Section 1983 by demonstrating the existence of a custom, even if the custom has not received formal legislative approval. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n. 10, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452, 465 (1986). Courts have found a custom to exist based upon a well-settled practice within a municipality. *See, e.g.*, *Anela v. City of Wildwood*, 790 F. 2d 1063, 1069 (3d Cir. 1986) (holding that a long-standing practice that has become regular practice for the municipality constitutes a custom for purposes of establishing liability under Section 1983). Plaintiffs' factual allegations could support an inference that a long-standing practice existed in the school district. *See* Compl. ¶78 (alleging that Defendant has failed to provide services, accommodations and facilities which are legally accessible to disabled students). This Court finds that Plaintiffs have alleged the existence of a custom and have pleaded facts which could support an inference of a well-settled practice constituting a custom. Therefore, Defendant's Motion to Dismiss Plaintiffs' Section 1983 claims is denied.

Appendix E

CONCLUSION

Defendant's Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) is denied because Plaintiffs' allegations of systemic violations excuse them from the exhaustion requirement. Defendant's Motion to Dismiss Plaintiffs' Section 504 and Section 1983 claims pursuant to Rule 12(b)(6) is also denied. For the foregoing reasons, this Court denies Plaintiffs' Motion to Dismiss in its entirety.

ORDER

IT HEREBY IS ORDERED that Defendant's Motion to Dismiss (Doc. No. 7) is DENIED.

SO ORDERED.

Dated: September 30, 2001
Buffalo, New York

s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX F— RELEVANT STATUTES

20 U.S.C. § 1415(i)(1)-(2)(A)

20 U.S.C. § 1415(i)(1)-(2)(A) provides as follows:

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection

(g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. § 1415(l)

20 U.S.C. §1415(l) provides as follows:

(1) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under Subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Appendix F

20 U.S.C. § 1415(f)

20 U.S.C. § 1415(f) provides as follows:

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations

(A) In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

Appendix F

(B) Failure to disclosure

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluations recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the state educational agency or the local educational agency involved in the education or care of the child.

20 U.S.C. § 1415(g)

20 U.S.C. § 1415(g) provides as follows:

(g) Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

Appendix F

29 U.S.C. § 794(a)

29 U.S.C. § 794(a) provides as follows:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Appendix F

42 U.S.C. § 1983

42 U.S.C. § 1983 provides as follows:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.